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Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act

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Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act

Updated February 9, 2005

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Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act

Summary

Under Section 14(c) of the Fair Labor Standards Act (FLSA), persons with various physical or mental disabilities (or persons who have vision impairment or are blind) can be employed at rates below the otherwise applicable federal minimum wage. Under certificates issued by the Secretary of Labor, their wages are set at a level *commensurate* with their productivity and reflective of rates found to be *prevailing* in the locality for essentially "the same type, quality, and quantity of work." For these workers, under current law, there is no other statutory wage rate.

The origins of Section 14(c) treatment of persons with disabilities go back at least to the National Industrial Recovery Act (NIRA) of 1933-1935. Under the NIRA, a productivity-based sub-minimum wage, arranged through a system of certificates, was established for persons with disabilities. In competitive industry, such workers were payable at 75% of the industry minimum. In *sheltered workshops*, there was no wage floor. The NIRA was declared unconstitutional in 1935.

With passage of the FLSA in 1938, the certification system was reestablished under Section 14 of the Act. No statutory wage floor was set for persons with disabilities, though, *administratively*, minimum wages for the disabled in competitive industry came to be set at 75% of the federal/FLSA minimum. In the sheltered workshops, the floor was productivity-based with no lower limit. Under the 1966 FLSA amendments, the system was modified. The rate for persons with disabilities was set *in statute* at not less than 50% of the FLSA minimum, both in competitive industry and in workshops, except that in separate *work activities centers* where employment was largely therapeutic and its economic content *inconsequential* there was no statutory floor.

Charges of inequities followed — together with a rapid expansion of employment in the *work activities centers*. Some suggested that workers with vision impairment should not, on that basis alone, be included under the Section 14 reduced wage option. A number of studies subsequently reviewed operation of the system. Congressional hearings on the issue were conducted repeatedly through the years. In 1986, Section 14(c) was amended to remove the separation of workshops and work activities centers — and to eliminate any statutory wage floor for persons with disabilities in certificated employment. In theory, such workers were to be paid a wage *commensurate* with their productivity. In 1994, further hearings were held and it was asserted that the entire system of productivity-based sub-minimum wage rates was inequitable and unworkable. The law, however, supported by employers of workers with disabilities, was not altered.

The issue resurfaced in the 107th Congress but no action was taken on the proposed legislation. Since that time, the issue has remained legislatively dormant. However, one may expect to see some movement in this area in keeping with other adjustments to the FLSA.

Contents

Most Recent Developments 1

General Introduction 1

Current Practice 3

Some General Questions with Respect to Implementation of Section 14(c) 4

Evolution of the Section 14(c) Program 6
- The Early Initiatives, 1933-1939 6
- Reform and Oversight (the 1960s) 8
  - The Morse Proposal and Statutory Change (1965-1966) 9
  - The 1967 DOL Report 10

The 1978 Hearings on the Burton Proposal 11

The 1980s: Oversight and Restructuring 13
- *The Wall Street Journal* Investigation 13
- The Beard Hearings (1980) 14
  - Testimony from the Department of Labor 14
  - Assertions, Pro and Con 16
- The GAO Report of 1981 21
  - Separating WACs from Regular Workshops 21
  - General Enforcement and Compliance: The “Commensurate” Rate 22
- The Nickles Hearings (1982) 24
- The 1986 FLSA Amendments 25
  - The Murphy Hearings (1985) 26
  - Section 14(c) Amended (1986) 27

The Issue Reopened (1994) 29
- The Traficant Proposal 29
- The Murphy Hearings 29
  - Worker and Employer Testimony 30
  - Testimony from Donald Elisburg (private citizen) 30

Proposals of the 106th Congress 32

Activity During the 107th Congress 33
- New Legislation 33
- GAO Revisits Section 14(c) 33

During Subsequent Congresses 34

Concluding Observations 34

List of Tables

Table 1. Specialized Wage Treatment of Workers with Disabilities Under the National Industrial Recovery Act (1933-1935) and the Fair Labor Standards Act (1938 ff.) 28

Treatment of Persons with Disabilities Under Section 14(c) of the Fair Labor Standards Act

Most Recent Developments

On March 6, 2001, then-Representative Johnny Isakson (R-GA) introduced H.R. 881 dealing with employment of the certificated disabled. The bill would have amended the Fair Labor Standards Act (FLSA) to prohibit the Secretary of Labor from issuing a certificate allowing payment at a sub-minimum/productivity rate to persons whose only disability is vision impairment. Persons with multiple disabilities (including but not limited to vision impairment) could still have been paid at the Section 14(c) sub-minimum/handicapped rate.

The Isakson bill was not acted upon. No further consideration of the issue has been undertaken since that time; however, given the nature of the issues involved, some further consideration may not be unlikely.

General Introduction

Under Section 14(c) of the FLSA, "to the extent necessary to prevent curtailment of opportunities for employment," the Secretary of Labor may permit payment of wages lower than the otherwise applicable federal minimum to persons "whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury." The reduced wage option operates under a system of certificates issued by the Secretary. No specific wage floor is mandated. However, the Section 14(c) rate is to be, broadly, "commensurate with those [wages] paid to nonhandicapped workers, employed in the vicinity in which the individuals under certificates are employed for essentially the same type, quality, and quantity of work." The Section 14(c) wage is to be "related to the individual's productivity."[1]

Section 14(c) of the FLSA is narrowly focused. It deals only with workers who, because of a disability, are deemed to have their productivity (for the particular type of work in which they are engaged) reduced below that of non-disabled workers. Because of that putative diminished productivity, they are payable at a wage below

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[1] Section 214(c) of the Fair Labor Standards Act, as amended. The Act is the primary federal statute dealing with minimum wages, overtime pay, child labor, and related issues.

the otherwise applicable federal minimum. Where such workers earn in excess of the federal minimum wage, Section 14(c) is not applicable.[2]

Some Section 14(c) workers are employed in sheltered workshops; others, in regular firms. By the mid-1990s, there were 5,912 certificated rehabilitation centers employing about 241,000 disabled workers. In competitive employment, there were 1,809 certificates for authorized employment of 6,807 workers.[3] Of the universe of workers with disabilities covered by Section 14(c), only a small number list visual impairment as their primary disability: the most numerous categories being retardation or mental illness. Statistical measurement in this area is complicated in that workers may have a single disability or may have multiple disabilities. Further, with training (or placed in a specialized work environment), they may be able to overcome one of their disabilities but not another. And, those employed under Section 14(c) represent a relatively small proportion of persons with disabilities — or, for that matter, of persons with disabilities who are employed but who are outside the Section 14(c) system.[4]

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[2] This report focuses narrowly upon Section 14(c) of the FLSA. For a broader consideration of issues involving persons with employment disabilities, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

[3] U.S. Department of Labor, Employment Standards Administration, *Minimum Wage and Overtime Hours Under the Fair Labor Standards Act: 1998 Report to the Congress Required by Section 4(d)(1) of the Fair Labor Standards Act*, Washington, June 1998, p. 42. (Hereafter cited as DOL, *Section 4(d)(1) Report*.) The certificates, the Department notes, include "temporary certificates for trainees that were issued by state vocational rehabilitation agencies and the Veterans Administration and certificates issued for school work-experience programs." Where workers have multiple disabilities, an accurate count (with distinction as to primary and/or secondary disability) may prove difficult. Further, disabled workers, like others, may move in and out of the workforce. It is not always clear how long a disabled worker may remain engaged in sheltered employment or how many persons may find sheltered employment a short-term expedient. Wage data are similarly problematic. Wages for such workers are, in theory, *commensurate with* their productivity. But, since productivity may vary with a shift from one production process to another, their *commensurate* wage can be flexible. Specific wage data are not readily available.

[4] Estimates of the number of persons with disabilities and of their employment status vary substantially, depending upon the definition of *disability* and of *employment*: concepts that appear to differ from one context to another. In 1997, there would seem to have been about 14 million persons with disabilities in the labor force. See John M. McNeil, *Employment, Earnings, and Disability*, a paper prepared for the 75th Annual Conference of the Western Economic Association International, June 29-July 3, 2000; and CRS Report RL30653, *The Employment of People with Disabilities in the 1990s*, by Linda Levine.

Under Executive Order 13078 of Mar. 13, 1998, President Clinton established a National Task Force on Employment of Adults with Disabilities, to be chaired by the Secretary of Labor. *Inter alia*, the Task Force (BLS and the Census Bureau) was directed to "design and implement a statistically reliable and accurate method to measure the employment rate of adults with disabilities" and to report prior to termination of the Task Force in 2002.

In the 106th Congress, legislation was introduced that would have removed vision-impairment from the criteria for a Section 14(c) exemption: *inter alia*, H.R. 3540 (Isakson) and S. 2031 (Dodd). Neither bill was acted upon. ***In the 107th Congress***, a similar measure was introduced by Representative Isakson: H.R. 881. The bill was referred to the Committee on Education and the Workforce, Subcommittee on Workforce Protections. No further action has been taken on this issue.

This report sketches the evolution of wages and related issues under Section 14(c) of the Fair Labor Standards Act. *It does not deal with other workplace issues affecting persons with disabilities*.

Current Practice

Under Department of Labor (DOL) regulations, a worker with a disability is one "whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury, *for the work to be performed*." (Italics added.) Such disabilities may "include blindness, mental illness, mental retardation, cerebral palsy, alcoholism, and drug addiction." The regulations acknowledge that "a disability which may affect earning or productive capacity for one type of work may not affect such capacity for another."[5]

Employment is defined broadly in the FLSA: i.e., "to suffer or permit to work." The existence of an employment relationship "does not depend upon the level of performance or whether the work is of some therapeutic benefit." Patients, working within an institutional context, may be classified as employees if "the work performed is of any consequential economic benefit to the institution."[6] Some difficulty may arise in distinguishing strictly charitable or therapeutic activity from marginally profitable work. Case-by-case judgments are necessary.

Disability is not a unilateral judgment on the part of an employer. The "nature and extent" of the disability must be assessed, together with the precise relationship between the disability and reduced productivity: a disability unrelated to productivity is insufficient for Section 14(c) purposes. A comparison must be made between the "productivity of the workers with disabilities" and "the norm established for nondisabled workers" — with careful documentation maintained by the employer. For each of these measurements, a carefully structured system has to be in place.[7]

When a certificate has been issued to an employer for employment of workers with disabilities, the terms of the certificate are to be made known to the worker

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[5] Concerning regulatory language, see 29 CFR 525.

[6] There is a specialized certificate program for patient workers. In 1996, 376 certificates were issued for authorized employment of 14,472. See DOL, *Section 4(d)(1) Report*, p. 42, cited above.

[7] Whether such systems actually are in place and the extent to which they are feasible is part of the continuing debate with respect to Section 14(c) — and is discussed below.

"and, where appropriate, a parent or guardian of the worker." When a disabled worker is hired, an "initial evaluation" of his productivity "shall be made within the first month after employment begins in order to determine the worker's *commensurate wage rate*." (Italics added) Further, the employer must agree (a) to review the wage rates paid to such workers at least once every six months and (b) to review the wages of all Section 14(c) employees at least once each year to insure that the Section 14(c) wages "reflect changes in the prevailing wage paid to experienced nondisabled individuals employed in the locality for essentially the same type of work." The worker ("or the parent or guardian" of the worker) may appeal to the Secretary concerning the circumstances of his or her employment.

Under the *commensurate rate*, there is no effective floor; it can vary from zero to the full FLSA minimum. Where workers are paid in excess of the regular FLSA minimum wage, the wage requirements of Section 14(c) are basically moot.

Some General Questions with Respect to Implementation of Section 14(c)

Through the years, the Section 14(c) reduced wage option has sparked a range of questions. For example, is the sub-minimum wage (commensurate rate) equitable and appropriate? Does it lend itself to abuse? And, has the Section 14(c) program been monitored, effectively, by the DOL? Beyond these concerns, some have questioned whether the blind (based upon their vision impairment alone) ought to be included under the Section 14(c) commensurate wage option. Might approaches, other than the sub-minimum wage option under Section 14(c), be more effective in providing income, rehabilitation, and other services to persons with disabilities within sheltered employment?

Within the context of Section 14(c), other more technical queries have also been raised. The regulations implementing Section 14(c) require substantive standards for measurement of the locally "prevailing wage rate" upon which, in part, the "commensurate wage" paid the disabled worker is based. In methodological terms, such determination can be complex. For a firm (or agency) employing persons with disabilities to secure comparable wage/benefit data from competing firms — in the locality and engaged in essentially the same type of work — also presents problems. Comparability may pose a question: i.e., finding the same or similar production processes, product lines, equipment, work organization, managerial input, etc.

When is a worker disabled for Section 14(c) purposes? How is *impairment* measured — and by whom? While there must be a relationship between the specific disability and the type of work performed (with resultant diminished productivity), would the worker be equally disabled in all occupational circumstances? What if the work were more carefully structured or if specialized equipment were utilized? Are all deviations from the *norm* equally burdensome and equally an impairment: e.g., physical disability, mental retardation, loss (or partial loss) of vision? Such assessments may be difficult to render under the best of circumstances; where workers have multiple-disabilities, significant sophistication and staff training may be required.

Disabled persons in sheltered workshops often work as teams which raises further questions concerning wage rates. DOL regulations note: "Employers may 'pool' earnings only where piece rates cannot be established for each individual worker" — as, for example, in "team production" where "each worker's individual contribution to the finished product cannot be determined separately." In such situations, the employer is admonished to "make every effort to objectively divide the earnings according to the productivity level of each individual worker." Such disaggregation, however, may be impossible.

Even though most operators of sheltered workshops are charitable or nonprofit institutions or governmental entities, they are nonetheless *employers* and have a labor-management relationship with Section 14(c) workers. Where such workers are not covered by a collective bargaining agreement, who bargains for them? Who negotiates for them in the employment process? Their disabilities may reduce their options for other employment, shaping the power balance in the labor-management relationship. Where Section 14(c) workers are represented by a parent or guardian, there may be a subtle conflict of interest. Allowing the disabled person to engage in useful activity (even if *largely* custodial) may be of primary importance: whether that activity is also economically productive may be of less concern — to the parent or guardian.

The Section 14(c) reduced wage option is permitted though certification by the Secretary of Labor. But, how closely does DOL monitor the actual wages and working conditions of such employees and inspect *sheltered workshops* or *work activities centers*? When an inspection is made, are the concerns of the workers — some blind, some perhaps unable to speak clearly, others emotionally disturbed or mentally retarded — given appropriate weight vis-a-vis those of the supervisory staff?

Is there a similarity of interest among all Section 14(c) workers, regardless of the severity of their disabilities?[8] Are differences of individual productivity adequately taken into account when structuring work — and with respect to wages? While there is a complex system through which a worker (or his parent or guardian) can appeal to the Department, is the process effective and effectively available to workers with disabilities who are, by definition, disadvantaged — often personally and in the world of work?

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[8] As noted above, the definition of a "disability" may vary from case to case. For some workers who could not tolerate competitive employment, there may be a prolonged need for sheltered work. For others, whose disability is marginal, a brief period of training may allow them to be transitioned into competitive employment.

Evolution of the Section 14(c) Program

Work-related programs to assist persons with disabilities share a common purpose: to allow the client/worker population "to work and to acquire the benefits that come from work."[9] Those benefits may include skill development, socialization to the world of work, a sense of personal confidence and esteem, rehabilitation, and social contact. ***But***, they may also include an employer's desire for productivity and a worker's desire for wages earned under decent working conditions. Thus, arguably, public policy might be expected to seek a balance between humane considerations and economic interests.

The Early Initiatives, 1933-1939

The origins of Section 14(c), like much else about the FLSA, are linked to the NIRA of the early New Deal. Under the NIRA (1933-1935), codes of conduct which normally included minimum wage, overtime pay, and related standards, were written for most industries. Once in place, they provoked a flood of complaints that employers "took advantage of the codes to break down decent standards." Some charged that ordinary workers were artfully classified in order to exempt them from otherwise applicable standards while categories of work (traditionally performed by the older workers and by minorities) were defined as beyond the reach of the codes.[10]

On February 17, 1934, President Roosevelt issued an Executive Order defining the treatment of persons with disabilities under the NIRA. He decreed that a person "whose earning capacity is limited because of age, physical or mental handicap, or other infirmity, might (with DOL certification) be employed on light work at a wage below the minimum established by a Code." *No wage floor was established other than that specified in the certificates for employment*. DOL set about development of "methods of determining who are *substandard workers*" but, then delegated actual operation of the program/option to the several state agencies.[11]

To prevent manipulation of the system by employers seeking low-wage labor under the pretense of helping persons with disabilities, certificates specified the nature of the disability of each individual worker, his work history, prospective wage, etc., with a place for a doctor's estimate of the specific physical or mental

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[9] Nathan Nelson, *Workshops for the Handicapped in the United States: An Historical and Developmental Perspective* (Springfield, Ill.), Charles C. Thomas, Publisher, 1971, p. 5. (Hereafter cited as Nelson, *Workshops for the Handicapped in the U.S.*)

[10] These assertions may need further research to assess. See Bernard Bellush, *The Failure of the NRA* (New York: Norton and Company, Inc., 1975), pp. 43-44, 55, 74-78, and 166; and Raymond Wolters, *Negroes and the Great Depression: The Problem of Economic Recovery* (Westport, Conn.: Greenwood Publishing Corporation, 1970), pp. 110-112.

[11] Department of Labor, *Twenty-Second Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1934* (Washington: GPO, 1935), p. 7. Italics added. See also Margaret H. Schoenfeld, "Analysis of the Labor Provisions of NRA Codes," *Monthly Labor Review*, Mar. 1935, pp. 574-603. (Hereafter cited as Schoenfeld, *Analysis of the Labor Provisions of NRA Codes*.)

condition.[12] A linkage between impairment and productivity was necessary with the wage reduction "proportionate to the reduction in their [the worker's] efficiency."[13]

With time, these workers came to be divided into three classifications under the NIRA. **First**, there were employees of *sheltered workshops* where the wage floor was set by the charitable institution.[14] **Second**, there were disabled workers in the private for-profit sector where the floor (in the absence of a special code provision) could not be "less than 75 percent of the minimum wage" in the industry. Such workers could not constitute more than "5 percent of the working force in any establishment."[15] **Third**, special treatment was later afforded certain persons who, by virtue of disability, were employed in industrial homework.[16] When the NIRA was declared to be unconstitutional (May 27, 1935), its requirements were largely set aside.[17]

Two years later, in May 1937, President Roosevelt called for enactment of federal wage and hour legislation, a proposal that touched off a year of debate — part of which focused upon workers who might be regarded at outside the mainstream. During hearings on the legislation, Labor Secretary Frances Perkins endorsed a reduced wage option for "substandard workers" whom she understood to include "persons who by reason of illness or age *or something else* are not up to normal production."[18] As consideration of the legislation progressed, it became less clear how "substandard workers" and "or something else" might be interpreted. Some argued that in certain regions of the country (namely, in the South), workers tended to be slower of movement and less oriented toward production — and, thus, they should be payable as "substandard" workers. Others saw the option as a device through which "to discriminate against Negro workers as was done under N.R.A."[19] Such concerns set the stage for ongoing debate over *sub-minimum* wages for various segments of the workforce.

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[12] "Enforcement of Code Provisions Limiting Employment of Handicapped Workers," *Monthly Labor Review*, May 1934, p. 1058. "Old age" did not require a doctor's certificate.

[13] Schoenfeld, *Analysis of the Labor Provisions of NRA Codes*, pp. 595-596.

[14] "Exemption of Handicapped Workers and Sheltered Workshops from Code Provisions," *Monthly Labor Review*, Apr. 1934, p. 804.

[15] Schoenfeld, *Analysis of the Labor Provisions of NRA Codes*, p. 595; and "Enforcement of Code Provisions Limiting Employment of Handicapped Workers," *Monthly Labor Review*, May 1934, p. 1058.

[16] Executive Order 6711-A by President Franklin D. Roosevelt, May 15, 1934, compiled in *United States Executive Orders*, available in the Law Library, Library of Congress.

[17] "National Recovery Program: Decision of Supreme Court on the National Industrial Recovery Act," *Monthly Labor Review*, June 1935, pp. 1466-1483.

[18] U.S. Congress, Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, *Fair Labor Standards Act of 1937*, hearings, 75th Cong., 1st sess., June 4, 1937, and forward. (Washington: GPO, 1937), p. 190. Italics added. (Hereafter cited as Joint Hearings, *Fair Labor Standards Act of 1937*.)

[19] Ibid., p. 573-574. It was also suggested that the determination of "substandard" be left up to the various states.

In general, a reduced wage for workers with disabilities under the FLSA seemed to provoke little concern. Largely following NIRA practice, the 1938 statute read:

> Section 14. ... the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage ... and for such period as shall be fixed in such certificates.

Thus, for persons with disabilities, the wage floor was whatever the Administrator determined was appropriate. President Roosevelt signed the FLSA on June 25, 1938.

The Wage and Hour Administrator (DOL), sensitive to issues raised during the hearings, affirmed: "No Special Certificate will be issued for a worker because he is shown to be slow or inexperienced, unless he is handicapped within the meaning of the act and these regulations." Administratively, he set a wage floor of not less than 75% of the standard 25 cent federal minimum wage (i.e., 17½ cents per hour). ***However***, fearing that the 17½ cent rate might disrupt "the work of rehabilitation being carried on by ... charitable groups," he ruled that the wages in the sheltered workshops would be set "on the basis of earning capacity."[20] Thus, in practice, a dual standard was established: a productivity wage in sheltered workshops; a specific minimum rate for other sheltered employment.

From the beginning, the social services industry tended to dominate the program that would evolve as Section 14(c). Under the NIRA, a special Sheltered Workshop Committee had been established with representatives of charitable institutions and social work organizations. No one, it appears, was specifically representative of workers with disabilities.[21] Under the FLSA, the Department again called for counsel from "leaders in the field of rehabilitation among the handicapped." But, it was not clear who spoke for the persons with disabilities *as workers*.

Institutional spokespersons, inevitably, wore two hats: ***first***, as representatives of charitable institutions or related organizations; and, ***second***, as employers of the disabled (or associates of such employers). In the latter context, they were employers of unorganized workers, by definition suffering a disability, likely disadvantaged economically, and perhaps unable effectively to represent themselves in the labor-management relationship. Calling upon the social services and sheltered workshop community for leadership had a certain logic: but, it also presented a potential conflict of interest. The pattern would persist to the end of the century.

Reform and Oversight (the 1960s)

The FLSA's handicapped provisions remained unchanged for nearly three decades (i.e., no wage floor for sheltered workshops), a sub-minimum rate for sheltered employment in the competitive sector set administratively at 75% of the otherwise applicable federal minimum rate.

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[20] U.S. Department of Labor, Wage and Hour Division, Press Releases, R Series, Oct. 12, 1938, and Nov. 10, 1938.

[21] *NRA Press Release No. 5032*, May 12, 1934.

The Morse Proposal and Statutory Change (1965-1966). In June of 1965, Senator Wayne Morse (D-OR) proposed a change in the wage structure for the disabled under the FLSA. He proposed: (a) to bring the moderately disabled up to the full minimum wage over a three-year transitional period, and (b) to require that the more severely disabled — still under DOL certification — be paid not less than 50% of the otherwise applicable minimum."[22]

Employers of the disabled were critical of the Morse proposal, branding it "unrealistic" and "a drain on the economy" and forecast that its enactment "would deprive severely disabled people of the opportunity for employment."[23] During these debates, a cleavage developed between the blind and other workers with disabilities. In the early 1960s, there had been "a movement by some organizations for the blind and others to eliminate the minimum wage exemption for handicapped persons in workshops."[24] The National Federation of the Blind urged that the Morse proposal be adopted: that disabled workers be given "the same protection of federal law now available to millions of other workers." It argued that the sub-minimum wage option for sheltered workshops "permits ready abuse at the expense of handicapped workers, particularly in the absence of a vigorous investigation and enforcement program."[25]

Modified through the legislative process, the Morse proposal (P.L. 89-601) came to provide: **(a)** that the reduced wage option for the disabled be applied to agricultural employment; **(b)** that the wage rate in certificated employment outside of the *work activities centers* be not less than 50% of the federal minimum wage; and **(c)** that regular sheltered employment be divided from more nearly therapeutic sheltered employment ("work activities centers") for which there would be no wage floor. In the "work activities centers," operating under DOL certification, those with severe disabilities would be engaged in work "which is incidental to training or evaluation programs" and would be paid "at wages ... which are related to the worker's productivity." Congress mandated that such wages must "constitute equitable compensation" for center clients and defined "work activities centers" as:

> ... centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

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[22] *Congressional Record* (CR), June 28, 1965, pp. 14956-14957.

[23] U.S. Congress, Senate Subcommittee on Labor, Committee on Labor and Public Welfare, *Amendments to the Fair Labor Standards Act*, hearings, 89th Cong., 1st sess., Part 2, July 6-16, 1965 (Washington: GPO, 1965), pp. 1331-1333. (Hereafter cited as Senate Subcommittee on Labor, *Amendments to the Fair Labor Standards Act*.)

[24] Nelson, *Workshops for the Handicapped in the U.S.*, p. 134.

[25] Senate Subcommittee on Labor, *Amendments to the Fair Labor Standards Act*, p. 1341-1342, and 1352-1355. Hereafter, consideration of Section 14(c) issues became increasingly framed as a conflict between spokespersons for the blind, notably the National Federation of the Blind (NFB), and the social services industry. While there are many other entities that work in behalf of the vision impaired through various channels, the NFB has been a consistent presence through the years when Congress has considered the Section 14(c) issue.

DOL was directed to study the wage structure of "handicapped clients of sheltered workshops" and to report to Congress, with recommendations, by July 1, 1967.

The 1967 DOL Report. DOL accepted the spirit of the original (now modified) Morse proposal as indicative of the intent of Congress: i.e., "that handicapped workers' wages be raised to at least the minimum wage as soon as feasible."[26]

The 1967 DOL *Report* suggested that workshops, themselves, were partly to blame for the reduced productivity of sheltered workers (i.e., the result of "obsolete methods of organization and production.")[27] It averred that the industry had not been entirely forthright in dealing with the wage issue under the 1966 amendments. "Instead of increasing wages," it suggested, the workshops had reinvented themselves as "work activities centers ... and thus have no applicable statutory minimum wage rate." However, it concluded, a further minimum wage increase would be "more likely to increase the number of 'work activities centers' than to increase wages."[28]

Instead, to provide workshop employees a realistic earning opportunity, DOL proposed: wage supplements for disabled workers, increased funding of social services, improved equipment in the facilities, and technical assistance for managers. In short, it urged an expanded public commitment to the disabled. The *Report* concluded: "We must at the outset face up to the fact that the achievement of a full minimum wage for handicapped clients of sheltered workshops will require outside financial support." And, it added: "This will mean a basic shift away from basing wages on what the handicapped worker can 'produce.'"[29]

Implicit in the DOL *Report* were a number of complex policy issues. For example: **(a)** Should there be federal wage subsidies for disabled workers? If so, how should they be determined and upon what should they be based? What ought to be the relationship between the earnings of workers in sheltered employment and any welfare or other benefits which they may receive? **(b)** Given the client diversity in sheltered employment, should clients enjoy equality of compensation? Would *productivity-based earnings* be reduced where severely disabled and minimally disabled persons engage in team production? Might such arrangements have a disproportionate impact upon the blind? **(c)** Profitability of sheltered employment and the wages of handicapped workers depends upon involvement in the market.

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[26] U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, *Sheltered Workshop Report of the Secretary of Labor* (Washington, GPO, Sept. 1967), p. 1. (Hereafter cited as DOL, *Sheltered Workshop Report*.)

[27] Ibid., p. 2-3.

[28] Ibid., p. 4-5. The number of work activities centers "increased from 513 in 1968 to 3,656 in 1981" while during the same period, regular workshops "increased from 686 to 1,854." See U.S. Congress, Senate Subcommittee on Labor, Committee on Labor and Human Resources, *Amending the Fair Labor Standards Act of 1938*, hearing, 97th Cong., 2nd sess., Aug. 11, 1982 (Washington: GPO, 1982), p. 5. (Hereafter cited as Senate Subcommittee on Labor, *Amending the Fair Labor Standards Act of 1938*.)

[29] DOL, *Sheltered Workshop Report*, pp. 5-7.

Might subsidized sheltered employment unfairly compete with *un*subsidized private sector firms and their workers? **(d)** Might the very nature of sheltered employment be conducive to exploitation of the disabled worker? In the absence of a union, who would speak for such workers? Is it feasible to combine, in one person (or institution), the roles of caregiver, therapist and employer?

The 1978 Hearings on the Burton Proposal

After 1966, it appears, the number of persons with disabilities served under Section 14 increased substantially. Further, clients enrolled in sheltered programs appear to have had a higher "level of severity" of disability than those of prior years. There seems also to have been increased pressure with respect to productivity and out-placement and enhanced tension among groups of disabled workers/clients. At the same time, the "average hourly earnings in workshops" had not kept pace with the statutory minimum.[30] Perhaps for all of these reasons, congressional oversight in 1978 seems to have focused upon sheltered employment of persons with vision impairment. Should they continue to be a part of the sheltered programs; and, if so, upon what basis and through how long a period?

In June 1977, Representative Phillip Burton (D-CA) introduced legislation to prohibit payment of Section 14(c) sub-minimum wages to "individuals who are blind or whose sight is impaired." The Burton bill was not intended to exclude persons with vision impairment from sheltered employment: merely to insure that, were they so employed, they would be paid at least the federal minimum wage. The sheltered industry argued that such payment would be inequitable.

Hearings were conducted by the House Subcommittee on Labor Standards on May 10-11, 1978. James Gashel (National Federation of the Blind, NFB), describing himself as "the only non-industry person" at the opening session, declared that the Burton proposal would establish "a far-reaching principle ... that the blind are not to be considered as handicapped workers."[31] Management spokesperson Milton Jahoda (Cincinnati Association for the Blind), opposing the bill, questioned whether "... it [would] be fair, appropriate, ethical, or logical for a blind person to be paid the statutory minimum ... regardless of productivity [when engaged in team production], when a person who is a victim of cerebral palsy or who had some other disability is being paid according to his ability to produce? I would suggest," he said, "that it is not."[32]

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[30] U.S. Congress, House Subcommittee on Labor Standards, Committee on Education and Labor, *Application of the Fair Labor Standards Act to Blind and Handicapped Workers*, hearings, 95th Cong., 2nd sess., May 10-11, 1978 (Washington: GPO, 1978), p. 91. (Hereafter cited as House Subcommittee on Labor Standards, *Application of the Fair Labor Standards Act to Blind and Handicapped Workers*.)

[31] Ibid., p. 32.

[32] Ibid., p. 61.

Proponents of the Burton bill suggested that blind workers were often victimized by their employers (sometimes by indirection) — even by non-profit and quasi-charitable employers. They argued that sheltered workshops, perhaps because of their charitable and welfare orientation, were often not structured for profitability and production. Managerial practice in such establishments, it was argued, tended to be *soft* — with managers failing to manage. Further, it was argued, employment in the workshops could have a negative impact upon a worker's skills and self-confidence, retarding transition to competitive employment: e.g., payment of a sub-minimum wage, a constant reaffirmation of the worker's putative inability to produce. They noted a conflict of interest where the workshops are expected to compete in the market while transitioning their best workers to competitive industry.

"The system of certification ... is open to abuse and has been abused," Gashel stated. "It is confusing and cumbersome; how can a blind worker have any confidence that he or she is receiving what the law allows?" He noted the complex structure of certification and argued that "only a lawyer, an accountant, or perhaps a federal bureaucrat can determine how they relate and apply in any particular case."[33] It should be noted that while these arguments were made by advocates for the blind, they could be used as well to argue against sub-minimum wage rates for certain other disabled workers.

Industry tended to oppose the Burton bill. As managers with responsibility for diverse groups of client/workers, they saw a different set of opportunities and challenges — and tended to emphasize the therapeutic value of work, not its economic rewards. Some blind persons, they conceded, may be fully competitive with sighted individuals; others may need an opportunity to work in "sheltered" employment where the pace is restrained, supervision is readily available, and accommodation can be made for idiosyncracies. Such opportunities are costly, both in terms of staff and of diminished overall production. A sub-minimum wage helps offset those costs.

What some may perceive as managerial inefficiency, the industry suggested, may well be adjustment by staff to the special needs of workers in different stages of skill development. Similarly, while an absence of sophisticated equipment may reflect the fiscal constraints of quasi-charitable institutions, it *may also* be an accommodation to the skill levels of a workforce that is, by definition and recruitment, disabled. Finally, a team approach to work, institutional witnesses suggested, provides a context for learning and growth. There may be utility in mixing workers of differing levels of growth in a single production process so that they learn from each other.

The hearing also focused on DOL administration of the Section 14(c) program. Wage and Hour Administrator Xavier Vela noted that some 163,000 handicapped workers were then employed (1978) in 3,511 certificated sheltered workshops.

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[33] Ibid., p. 49-50. It was also argued that some workshops, as charitable institutions, were recipients of community support, have tax advantages, are favored by federal and local governments in procurement terms — and, therefore, should be expected to pay at least the minimum wage.

During FY1977, DOL made "a total of 155 onsite investigations ... an increase of 67 percent over the previous year."[34] At that rate, it could be expected to take about 22 years to complete a cycle of oversight of sheltered employment. Vela, however, noted other complications. "Many of the managers of the sheltered workshops are not sufficiently knowledgeable in costing and pricing," he said, "... essential elements of a successful workshop operation." And he pointed to "the relatively high turnover of top workshop staff."[35] Thus, there emerged an image of a program for the disabled, lacking in federal oversight, managed by ill-trained staff, and subject to high managerial turnover.

The Burton proposal was not adopted. It did, however, provide an occasion for a reexamination of Section 14(c).

The 1980s: Oversight and Restructuring

In 1979, *The Wall Street Journal* published two investigative articles on employment of the blind in the New York City area and in certain other sections of the country as well. These provoked further congressional interest and led to an inquiry by GAO into operation of Section 14(c). Hearings would follow in the House (1980), in the Senate (1982) and again in the House (1985). In 1986, Congress would amend Section 14(c), reversing the position it had taken 20 years earlier.

The Wall Street Journal Investigation

Reporters Jonathan Kwitny and Jerry Landauer opened their *Wall Street Journal* series with the observation: "Blind people for years have entered the job market through so-called sheltered workshops — sheltered by law, that is, from having to pay the blind workers the minimum wage." Further, "many of the blind workers feel they are working at coolie wages, helping to fatten the profits not only of the charities that run the workshops but also of the big companies" that contract with them.

Workshop administrators, they stated, justify the low rates on at least two grounds: that blind workers "produce less" and that "in any case most blind workers receive other benefits through Social Security payments and tax exemptions." They wrote about low wages and adverse working conditions — and about blind workers allegedly fired for pro-union activity. Management had opposed unionization, *The Journal* reported. It suggested that, to management, "its *blind workers aren't employees but 'clients'*." (Italics added.)

Kwitny and Landauer went on to discuss administrative and financial practices within the workshops and the related institutions: the allegedly high salaries for administrators (some said to be military personnel on pension), and the relationship

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[34] House Subcommittee on Labor Standards, *Application of the Fair Labor Standards Act to Blind and Handicapped Workers*, pp. 91-92. A parallel issue is the quality of the investigations undertaken. (See discussion, below.)

[35] Ibid., p. 92.

between the workshops and the business community. Were the workshops operating under an unfair competitive advantage?[36] Also questioned was the institutional relationship between the regular workshops and the *work activities centers*.[37]

The Beard Hearings (1980)

In May 1980, the House Subcommittee on Labor Standards, chaired by Representative Edward Beard (D-RI), conducted two days of oversight hearings on Section 14(c) and on legislation reintroduced by Representative Burton. The hearings produced little consensus among worker and employer witnesses, but did suggest, overall, that something was amiss. DOL confirmed that its oversight of the program had been inadequate — but it offered little hope of substantive improvement. Internally, the system of sheltered employment seemed conflicted with growing tensions between the least and most severely disabled. The wage rate determination process, it was argued, was inadequate. Nor did employers of the disabled provide a totally clear picture of who they were and what their mission was.

As the lead witness, Representative Patricia Schroeder (D-CO) charged that the industry was guilty of "workshop schizophrenia." It was a critical issue that would infuse debates on the issue through the next two decades. She noted that some workshops "consider themselves to be both a rehabilitation center providing services to their 'clients,' and a place of employment providing work to their 'employees.'" The dichotomy could not be ignored with impunity. She called for a "top to bottom reorganization" of the system with the crucial "first step" — that workshops come to regard their "'clients' as 'employees'."[38]

Testimony from the Department of Labor. As in 1978, a central and critical issue was of DOL administration of the Section 14(c) program. The primary Departmental witness was Donald Elisburg, Assistant Secretary for Employment Standards since the beginning of the Carter Administration — with responsibility, *inter alia*, over Section 14(c).

Elisburg's opening comments were largely factual and routine. He assured the Subcommittee that DOL "cares about the welfare of workers in sheltered workshops and is committed to the vigorous enforcement of fair labor standards in those workshops." He noted there were then "4,000 certificated workshops employing nearly 180,000 workers" with work activities centers accounting for "slightly over two-thirds of all sheltered workshop employment." Increasingly, he stated, certificated employment was of "the severely handicapped." Thus, he stated, "the yardstick for measuring the success of a workshop cannot simply be how many leave

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[36] *The Wall Street Journal*, Jan. 24, 1979, pp. 1, 35.

[37] *The Wall Street Journal*, Jan. 25, 1979, pp. 1, 31.

[38] U.S. Congress, House Subcommittee on Labor Standards, Committee on Education and Labor, *Oversight Hearings on Section 14(c) of the Fair Labor Standards Act*, hearings, 96th Cong., 2nd sess., May 14-15, 1980 (Washington: GPO, 1978), pp. 3-12. (Hereafter cited as House Subcommittee on Labor Standards, *Oversight Hearings on Section 14(c)*.)

... to enter competitive employment" but "must also be measured in more human terms" — "the sense of accomplishment and self-respect as well as income earned."[39]

Elisburg acknowledged that the workshop program had "long been considered routine" and had "suffered from a lack of attention by the policy makers of several successive administrations." The program, he said, was "relatively obscure with little attention focused upon it." Applications for sub-minimum wage employment "were routinely approved." The Wage/Hour Division had "demonstrated ... a low priority for investigations." Compliance staff "were not afforded the specialized training needed" for "dealing with the special procedures and technical problems involving the sheltered workshops." Again: "The Wage and Hour Division did not have an accurate barometer against which to measure the productivity of the handicapped worker."[40]

This was not an indictment from a new appointee, assessing the neglect of his predecessor. Elisburg, here, was three years into his tour of duty: his performance was under review. Although workers with disabilities apparently were not a primary concern for DOL, Elisburg recognized "a need to strengthen the management" of the program and "to commit more of our resources to its enforcement." In FY1979, he reported, DOL had found 57% of workshops investigated were in violation of the wage requirements of the FLSA. But, he also acknowledged that the Department expected to investigate only 10% of the 4,000 workshops during FY1980: i.e., *that a workshop employer of the disabled could expect to be investigated only once in a decade*.[41] He stressed the need for highly trained investigators, better training for workshop managers, a heightened awareness on the part of workers of their rights — and increased computerization to help with monitoring certification. "... we believe that we are now moving in the right direction. Our managers," he stated, "now understand that we expect the sheltered workshop program to be more than a paper processing operation."[42]

What could workers with disabilities expect from DOL, Chairman Beard challenged. Elisburg was reassuring. "... if we are properly running this workshop program, if we are carefully looking at these applications and the standards against which individuals are measured, those people with disabilities who are in these workshops should not be impeded in their productivity." Pointing to a hearing room "packed with people" who, he argued, feel that the law had not functioned properly, Chairman Beard queried: "... what guarantees can you give them?" Elisburg again was reassuring. "It is hard to give anyone a total guarantee, but we have stepped up

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[39] Ibid., pp. 17-21.

[40] Ibid., p. 28-29.

[41] Elisburg affirmed as DOL's "primary objective for the sheltered workshop program ... to monitor wage payments to insure that handicapped workers are paid wages commensurate with their productivity." DOL, he said "bears a particular responsibility to see that this program is vigorously enforced since these workers are largely unorganized and often hesitate to question their pay." (p. 28)

[42] House Subcommittee on Labor Standards, *Oversight Hearings on Section 14(c)*, pp. 21-27.

our investigations. We are very responsive to complaints." Then, he added: "... to the extent there has been exploitation, it should never have been allowed. We are simply not going to allow it in the future."[43]

Assertions, Pro and Con. Divisions of philosophy were evidenced, together with some measure of hostility between employer and employee groups. The schizophrenia referred to by Representative Schroeder early in the hearings — whether the disabled were "clients" or "employees" (by inference, whether the supervisors were *charitable social workers* or *employers*) — was readily apparent as the hearings progressed.

Employer/Manager Perspectives. "Few of us would deny the therapeutic aspect of a day's work," noted Jerry Daugherty (National Industries for the Severely Handicapped). "[M]ore important" than wages to the disabled, he suggested, "is the opportunity to work." In contrast to the depictions of *The Wall Street Journal*, Daugherty stated:

> To the handicapped individual, work means much more than therapy or wages. It means that there is a place to go where people are friendly, understanding and accepting. A place where the person has the chance to make a real contribution, to be appreciated as a valuable member of a team effort, and to participate in a meaningful and stimulating environment.[44]

But to pay such people a minimum wage, Daugherty argued, would be "disastrous."[45] He noted that sheltered workshops "survive on contract work, much the same way as small businesses do" and they "*must* be efficient and well-managed to survive." Without profits from the market, where the workshops compete, "their client/employees would not receive the counseling and training services that are necessary adjuncts to productive employment."[46]

The goods and services provided by sheltered workers must be available at "a fair market price," explained Charles W. Fletcher (Committee for Purchase from the Blind and Other Severely Handicapped). The sub-minimum wage under Section 14(c), he stated, permits workshops "to maintain direct labor costs which are generally competitive with the direct labor costs for commercial industry."[47] The impact of raising the wage of workshop employees, he argued, would have an "adverse impact" upon the ability of the workshops to compete.[48]

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[43] Ibid., pp. 30-32. For contrast, see Elisburg's 1994 testimony, below.

[44] Ibid., p. 229.

[45] Ibid., p. 226.

[46] Ibid., p. 223. Emphasis in the original.

[47] Ibid., p. 39. In much of the testimony, the character of the "workshop" was not clearly specified (i.e., whether a regular workshop (with a 50% FLSA minimum wage base) or a *work activities center* in which the wage was productivity-based).

[48] House Subcommittee on Labor Standards, *Oversight Hearings on Section 14(c)*, pp. 40-41.

Dean Phillips (Goodwill Industries) viewed workshops as "a very special kind of enterprise with a special type of employee or client. The basic purpose is not to make money or [to] be the most efficient producers, but to provide a real work setting for evaluation and training and," further, "to provide employment for persons who cannot find or retain work in the competitive labor market because of a disability or disadvantaging condition."[49] Phillips added: "We are certainly in favor of paying our handicapped clients the minimum wage, and more, when and where they can earn it, but sheltered workshops must operate in the real world." In the last analysis, he seemed to say, the workshops are businesses with a due respect for the bottom line.

> When workshops face wage increases due to new minimum wage levels, the workshop must face the same problem that businesses face. They must (1) increase efficiency, (2) obtain more productive workers, or (3) raise the price of the goods and services produced. ... To get more productive and efficient clients often means getting clients with less severe handicaps.[50]

The workshops, he noted, "are not immune to the fluctuations of the marketplace. They are separate entities, operating in an economic environment to obtain capital, labor, and commodities to deliver their services." Are the disabled, then *clients* or *low-wage labor* or both? Phillips observed: "We are, in reality, a special type of small business, competing in a free enterprise system to maintain solvency, to sustain growth, and to continue providing services to handicapped people."[51]

Joseph Larkin (General Council of Workshops for the Blind) stated the issue differently. If the disabled were "unable to earn substantial portion" of the minimum pay they received, it "might rob these workers of the incentive to exert their best efforts." If they "were to receive the minimum wage regardless of [their] ... productivity," Larkin reasoned, it could "inhibit his motivation toward increased upward mobility and in reality encourage less productivity."[52] "As professionals in the rehabilitation and welfare of blind people," Armand Leco (Rhode Island Association for the Blind) suggested: "it is better for those requiring a sheltered workshop situation to have employment at a lower wage than no wage at all."[53]

Worker/Client Perspectives. Not unexpectedly, workers viewed the issue differently. Kenneth Jernigan of NFB challenged that the "agencies which serve the blind and the workshops which employ the blind have often assumed the status of

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[49] Ibid., p. 79.

[50] Ibid., pp. 78-79.

[51] Ibid., pp. 80-81.

[52] Ibid., pp. 166-167. Ralph Sanders (Blind Industries and Services of Maryland) observed that employees, "without regard to their vision, respond to reward. Employees who are treated as being less than valuable respond in a similar fashion. Employees who are treated as valuable members of the manufacturing team respond positively." House Subcommittee on Labor Standards, *Oversight Hearings on Section 14(c)*, p. 113.

[53] Ibid., p. 517.

self-appointed spokesman for the blind."[54] He urged the Subcommittee to be alert to that distinction and pointed to "the myth of diminished productivity" to which the blind are subject and which provides the basis for "an elaborate network of agencies, societies, and associations ... which purport to help the blind while paying them the lowest possible wages."[55]

Productivity, Jernigan stated, rests largely with management. Section 14(c), he charged, "... unfairly discriminates by setting up a class of workers who are blind or handicapped and then forcing the members of this class to justify every penny of their paychecks by means of productivity ratings while working under conditions and with equipment over which they have no control." Workshop productivity, he argued, is impacted by "factors which are exclusively within the hands of management"and "is largely dependent on what management does, or conversely, on what management fails to do" — "poor job lay-out," "deliberate work-stretching by the workshop during periods when contracts are slow," "assembly lines slowed down to the lowest common denominator."[56]

Establishment of "'normal' productivity rates using the prevailing standards for similar work in similar industry as a base," he contended, is also unfair. Sheltered work, "... has little resemblance or parallel to the tasks which can be found commonly in open industry, and even where there are similarities you will find marked differences in production methods." Workshops "tend to be labor intensive where more mechanized production is used in the competitive" industry. Contracting practices also pose a problem with "small contracts and intermittent work" which means that the workshops "barely [have] time to work out the bugs in the production line before the project is over. These industries," he noted, "are generally not specialized, yet their productivity standards are based on the prevailing rates in plants which are."[57] Thus, data from which to develop "commensurate" wage rates are dubious. Finally, he suggested, there is the matter of labor standards compliance. Since DOL is "not exceedingly knowledgeable in what blind people can and cannot do," he stated, the workshops have "supervised themselves. You would not do that in any other kind of job and I don't think it is reasonable or fair to do it here."[58]

Implicitly expanding upon the Schroeder theme of *workshop schizophrenia*, Jernigan argued that the sheltered institutions were basically industries that "have covered their business activities with a veil of 'social services'" and labeled their workforce as "clients." He charged that they do "very little rehabilitation and a whole lot of business and industrial activity."[59]

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[54] Ibid., pp. 47-48. James Gashel appeared with Jernigan.

[55] Ibid., p. 49.

[56] Ibid., pp. 54-56.

[57] Ibid., p. 57.

[58] Ibid., p. 73.

[59] Ibid., pp. 54-55.

Some Observations Drawn from the Hearings. On two issues from the 1980 hearings, there would be especially strong disagreement between representatives of blind workers and the industry: the role of *work activities centers* and calculation of a *commensurate* wage rate.

The Place of "Work Activities Centers"? In 1966, Congress had provided for separation of work activities centers (WACs) from the regular workshops. The NFB agreed. "If the concept of a work activity center (where primarily therapeutic and rehabilitation functions are performed) is valid, then [it] ... is markedly different from a regular sheltered workshop (where productive business activity predominates)."[60]

If physically separate from the workshops (and some argued that they were not),[61] how were WACs treated in other respects? Were WAC-produced goods, of "inconsequential" value, marketed with products from the regular workshops? Where *services* (counseling, rehabilitative assistance) were available in both settings, were they arranged separately? Did this result in redundancy? Did the presence of less impaired workers in a WAC provides positive role models for severely disabled WAC workers, aiding in their socialization to the world-of-work? Might workers, informally or by assignment, move from WAC to workshop? And what of funding?

James Cox (National Association of Rehabilitation Facilities) testified that some believe separation of WACs from the regular workshops "inhibits productivity" and "upward mobility" for WAC clients. "We believe," he stated, "that facilities holding both types of certificates should not be *required* to integrate clients, but should be *permitted* to integrate less productive and more productive workers when the results will be higher productivity and wages" and facilitation of the "rehabilitation goals" of WAC clients.[62] But, in practice, how are WACs and workshops distinguished one from the other? The NFB would argue, conversely, that WAC/workshop integration inhibits productivity, results in lower wages, and could discourage the more severely disabled who might not be able to compete.

Prevailing Wage and "Commensurate" Wage. Workshops and WACs are supposed to utilize a sophisticated system to determine appropriate wage rates. Jack Jones of National Industries for the Blind, speaking from industry experience, explained how the system operates. For each manufacturing operation, the workshops "determine the 'going hourly pay' in plants in their own local geographical area for operations that are the same or have similar skill levels to their manufacturing operations." For data, they turn first to "their local Employment Service" — and, thereafter, if necessary, to other sources: the Chamber of Commerce, industry and trade associations, trade unions, and government agencies. But, if the workshop "cannot afford to pay the hourly rate because of the extent of

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[60] Ibid., p. 366.

[61] Some suggested that a "white line" painted down through the center of a room might, in some cases, be the indicator of division between the center and the regular workshop.

[62] House Subcommittee on Labor Standards, *Oversight Hearings on Section 14(c)*, pp. 144-145.

submarginal workers," it then applies to DOL for certification for payment of a lower wage.[63]

Thus, several elements are immediately involved, any one of which can distort the appropriateness of the wage to be paid. ***First.*** Are the locally prevailing wage rate determinations accurate? Since these seem to be made by each individual workshop for each product line and for each production process, the burden could be substantial. It could also require a high level of sophistication on the part of the workshop employee making the determination. ***Second.*** An assessment of the "submarginal" quality of individual workers must be made — not a simple task. ***Third.*** A judgment must be made (presumably by the employer) as to whether the workshop can "afford" to pay the locally prevailing rate. ***Fourth.*** The entire process must be reviewed by DOL — unless certification is more or less automatic.

Complexities abound. Is the sheltered workshop — even roughly — comparable to competitive industry? Are the production processes similar? Jones remarks: "Piece rates from industry are rarely used ... because a workshop's operations are usually modified in order to adapt to the capabilities of blind workers."[64] Since rates apply to individual production processes and product lines, is a new certificated rate developed with each change of activity? Are the rates shaped to fit the capability of each individual worker? What happens when workers are employed in teams?

How is a general production standard, modified to fit a *submarginal* workforce, applied to the individual worker? "Occasionally," Jones notes, "a production standard is not developed and an individual's productivity is determined by observation or performance rating. Performance ratings are generally done by the individual's foreman along with a rehabilitation counselor. They observe the worker for an extended period," he explained, "and determine how his productivity compares with a non-handicapped worker."[65] How often "observation" is used instead of a more precise method is not clear. Where comparison is made with outside industry, the process assumes, at least implicitly, that the prevailing wage data are accurate, that the evaluators observe both the disabled worker and the outside employee, and that the supervisory personnel are competent to render such judgments. But, who are the supervisors in sheltered employment? Are they trained professionals? Is the workshop "foreman" simply a less severely disabled worker? How high is the turnover rate for supervisory staff in sheltered workshops?

Wage/hour compliance inspections in competitive industry may be reasonably straight forward. In a sheltered workshop, the task is more complicated. Jones notes it "is difficult to verify the appropriateness of workshop wage rates. To do so," he explains, "it is necessary to go over each individual shop's records, operation by operation, and do a wage rate survey in the area. Comparisons of industry averages, average wages from annual reports and average wages by product ... can be very

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[63] Ibid., p. 525.

[64] Ibid., p. 525.

[65] Ibid., p. 526.

misleading." Even the wage paid may be complicated. The records, he explains, may show "average *earnings* which are the result of the worker's productivity plus make up pay and subsidy."[66]

The GAO Report of 1981

In September 1981, the General Accounting Office (GAO) issued a report on sheltered workshops that tended to underscore the issues raised during the hearings: that separation of the WACs from the workshops may have been more nearly a chimera than institutional reality, and that development of an accurate and fair *commensurate* rate was certainly difficult if not impossible. But, the extent to which either — the hearings or the GAO report (or the DOL report before it) — would impact public policy was not immediately clear.

Recalling the intent of Congress (1966) "to generally provide a guaranteed wage of 50% of the statutory minimum wage to handicapped persons working in ... sheltered workshops," the GAO report concluded the goal "has not been realized." Exemptions (evaluation, training, etc.) had allowed for payment of a lower rate. Further, with the shift toward WACs, it found that "[l]ess than 17 percent of the handicapped workers" employed in the workshops were "eligible for the Federal subminimum wage guarantee."[67]

Separating WACs from Regular Workshops. DOL regulations required WACs, physically separated from workshops and separately administered, to provide "therapeutic activities" with only "inconsequential" production. The regulations, GAO found, had "created an artificial distinction" that "cannot, in many instances, be substantiated by current sheltered workshop operating practices." Many WACs "did not appear to exclusively provide therapeutic activities, and it did not appear that the production of most handicapped workers was inconsequential."[68] Further, the available data from the workshops "do not provide an accurate or reliable measure of a workshop's compliance."[69]

Even for GAO, hard data were difficult to develop. It found, often, that the available records "did not ... differentiate between handicapped workers employed in a center and those employed in a regular workshop program," maintain appropriate wage/hour data, keep "separate information on dollar volume of sales for the work activities center," or "permit data to be retrieved within a reasonable time frame."[70]

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[66] Ibid., pp. 526-527. Emphasis in original.

[67] U.S. General Accounting Office, *Stronger Federal Efforts Needed for Providing Employment Opportunities and Enforcing Labor Standards in Sheltered Workshops*, Report to the Congress, Comptroller General of the United States, HRD-81-99, Sept. 28, 1981 (Washington: GPO, 1981), pp. 10-15. (Hereafter cited as GAO Report, *Stronger Federal Efforts Needed*.)

[68] Ibid., p. 18.

[69] Ibid., p. 19.

[70] Ibid., p. 21.

Separation of WACs from workshops was a problem and "federal criteria were sometimes not complied with." Some facilities were located in separate rooms or buildings; others were separated "by an aisle or temporary barrier in the same room" with WAC and workshop workers commingled. Though statute and regulations required that WAC clients ***not*** be engaged in activities the primary purpose of which was production, GAO found that in most WACs, "handicapped persons were employed on the same jobs or types of jobs" as workers in the workshops.[71]

General Enforcement and Compliance: The "Commensurate" Rate. As for DOL enforcement policy, GAO encountered a series of complexities. "... stricter interpretation of the work activities center concept would probably result in additional paperwork and administrative costs with minimal benefit for handicapped workers."[72] The disabled often "have little knowledge of their rights" under the FLSA while workshop managers "may inadvertently violate the act's provisions or not understand the steps necessary for compliance."[73]

During fiscal years 1977-1979, GAO found, between 3.8% and 5.9% of the universe of sheltered workshops had been investigated annually. Of those, it found that 60% had underpaid their workers. Most violations involved failure to pay "commensurate wages" and to conform to the terms of workshop certification.[74] GAO acknowledged that "compliance with the act's commensurate wage provision is not easily achieved." But, it found that in all of the workshops visited for its study, there were "problems in computing piece and hourly rates and in determining the appropriate prevailing wage rates" — in addition to faulty record-keeping practices.[75]

Establishment of *piece rates* (one standard upon which the commensurate rate rests) involves *time studies*. In practice, GAO found such studies ranged from simple counting to more sophisticated methodologies, but that they were irregular and not strictly applicable to real work conditions.[76] Straight hourly rates were equally difficult to determine. For purposes of comparison, productivity had to be measured not only for the disabled worker but also for those in competitive industry. A range of systems, often flawed, was in place. The *Report* noted:

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[71] Ibid., pp. 21-23.

[72] Ibid., pp. 22-23.

[73] Ibid., p. 29.

[74] Ibid., pp. 29-31.

[75] Ibid., p. 31. In 1977, Congress created the Minimum Wage Study Commission (MWSC), an *ad hoc* blue-ribbon panel. The seven-volume *Report of the Minimum Wage Study Commission* (Washington, GPO, 1981) in some measure paralleled the work of GAO. (Hereafter cited as *MWSC Report*.) In vol. V, p. 436, Andrew Kohen notes (of workshop studies of the late 1970s) that "... no hard data were collected on productivity, primarily because they do not exist. That is, the extremely variegated and somewhat haphazard practices of measuring the physical production of individual handicapped workers are not systematically documented by the workshops, in spite of the Federal Regulation requiring the payment of wages commensurate with relative productivity."

[76] GAO Report, *Stronger Federal Efforts Needed*, p. 32.

> there are two fundamental shortcomings: (1) a high degree of subjective judgment is required by someone who may or may not have any background in performance evaluation, and (2) workers may switch jobs, but retain the same hourly rate even though the individual's ability and level of productivity will probably vary for different jobs.[77]

Some assigned value *to the task*, not to the productivity of the worker. Some workers were paid on a modified seniority basis. Where outside workers may have received wage increases with fluctuations in the cost of living, those in the workshop (productivity- based) remained unchanged. Productivity of disabled workers, it was found, might vary (or be alleged to vary) with shifting medical, mental or other elements.[78]

Establishing the *commensurate* rate involves determination of the *prevailing rate* in the locality for a comparable type of work, a process left up to the individual workshop. But local firms, GAO noted, may be reluctant to provide wage information. Beyond a dollar amount, comparability of production processes must be determined. Not surprisingly, GAO found prevailing wage data (and, thus, the commensurate rate) not entirely adequate.[79] Assessing the accuracy of such determinations depends upon documentation which was not always kept: "productivity records, time studies, performance evaluations, and hours worked."[80]

DOL resources for enforcement were found to be "minimal" with compliance "to a large extent" voluntary with the workshops. By the nature of the Section 14(c) program, a "specially trained staff" seemed almost essential; but GAO found a fluctuating body of compliance officers — only intermittently and infrequently involved with Section 14(c) assignments. It estimated that 25 to 35 hours (three to four days) were required properly to investigate a single workshop: most investigations consumed significantly less time.[81]

Ultimately, GAO recommended that the FLSA be altered "to eliminate the provision" requiring a wage floor for handicapped workers — generally, the position taken by industry. DOL objected, but the proposal was endorsed by National

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[77] Ibid., p. 33.

[78] Ibid., pp. 34-35.

[79] Monroe Berkowitz, in *MWSC Report*, vol. V, p. 512, noted the "great confusion among workshop managers about the appropriate firms and jobs to sample in order to determine the prevailing wage, wide variety in methods used to establish production standards and uncertainty as to how to account for different supervisory-labor ratios and other conditions of work." Berkowitz (p. 509) pointed to the need to know "more about how manager motivation affected employment, wage, and production decisions" in the absence of "the usual profit-maximizing model."

[80] GAO Report, *Stronger Federal Efforts Needed*, pp. 35-37.

[81] Ibid., pp. 39-43. Here, what constitutes *an investigation* (a conciliation, an individual complaint, a comprehensive review) is not immediately evident.

Industries for the Blind and by National Industries for the Severely handicapped, Inc. — bodies generally representative of the sheltered workshop industry.[82]

The Nickles Hearings (1982)

In August 1982, Senator Don Nickles (R-OK), then Labor Subcommittee chairman, convened a hearing on legislation that he had introduced (S. 2634) to eliminate the required separation of WACs from workshops.[83] Senator Nickles maintained that the requirement had "become a hindrance to the employment and therapy of handicapped persons" and had prevented them from working with "more productive workers," thereby denying them "the models and also the stimulation which would only encourage greater personal development."[84] The latter argument, denial of role models and of stimulation from less severely disabled co-workers would remain central to the debate through the remainder of the century.[85]

Industry supported the Nickles proposal. Walter J. Payne (National Association of Rehabilitation Facilities) argued that separation of WACs from workshops creates "artificial barriers, both physical and psychological, between programs." Payne acknowledged that, "[q]uite often, similar work is being performed in both programs, except for the fact that persons able to produce at a higher rate are in the regular workshop rather than in work activities." But, then, separation, he said, "tends to stigmatize those persons in work activities centers."[86] Others suggested that elimination of the requirement would "enhance productivity and individual growth," "allow more effective use of available facilities, staff and dollars,"[87] "increase the productivity of work activity center clients,"[88] and "send a message to the severely handicapped ... that we do believe in the American way and that everyone does have the opportunity to accomplish and work to the best of their ability."[89] Admiral David

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[82] GAO Report, *Stronger Federal Efforts Needed*, pp. 127-131, 149, and 165. The *Report* noted extensive consultations by GAO with officials from industry and government; it is not clear that any workers (or their spokespersons) were consulted. Both NISH and NIB reviewed the *Report* prior to publication; their comments are included in the published document.

[83] See *CR*, June 16, 1982, pp. 13812-13814. Companion legislation was introduced in the House by Rep. Tom Petri (R-WI): H.R. 7178. See *CR*, Sept. 23, 1982, pp. 25021-25022.

[84] U.S. Congress, Senate Committee on Labor and Human Resources, Subcommittee on Labor, *Amending the Fair Labor Standards Act of 1938*, hearing. 97th Cong., 2nd sess., Aug. 11, 1982, p. 1. (Hereafter cited as Senate Labor and Human Resources Committee, *Amending the Fair Labor Standards Act of 1938*.)

[85] Ibid., pp. 2-3.

[86] Ibid., pp.4-5.

[87] Ibid., pp. 38-39.

[88] Ibid., p. 87.

[89] Ibid., p. 94.

Cooney (Goodwill Industries) added that the "whole emphasis in a successful workshop ... is on arranging the work so that it suits the individual's best needs."[90]

James Gashel of NFB, in opposition to the Nickles bill, noted that it would "effectively repeal the 50 percent minimum wage standard" applicable in the regular workshops. Further, he maintained that mixing of WAC and workshop employees would "result in lower productivity and lower wages" as the more productive workers were "forced to slow down in order to match their output" with that of the more severely disabled. Since wages would be productivity-based, the workers in regular workshops would "take a pay cut in order to accommodate" slower or less-skilled workers. The fundamental purpose of separation, he argued had been "to prevent exploitation of the members of either group — clients or workers."

Gashel's statement, Senator Nickles observed, presented the legislation as "for the benefit of the managers ... at the expense of the individual." The Senator denied that intent. Rather, he stated, it was intended to "open up doors of opportunity."[91] Critics had also suggested that the clients/workers were subject to exploitation, a premise that Senator Nickles questioned. Gashel responded that "in some of those workshops, actual exploitation does occur. Some of it is unintentional; some of it is intentional."[92] As the hearings closed, disagreement persisted.

The Nickles bill (S. 2634) was not reported from the full Committee on Labor and Human Resources. It died at the close of the 97th Congress.

The 1986 FLSA Amendments

Twenty years after it last revised Section 14(c), Congress would essentially reverse its earlier position. Several initiatives of the 99th Congress were combined into S. 2884, promptly passed and signed into law (P.L. 99-486).[93] The measure removed the minimum wage requirements for certificated employment of the disabled but added what sponsors argued were procedures through which workers employed under Section 14(c) certification might be protected. The adequacy of those protections would remain a source of contention and dispute into the 21st century.

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[90] Ibid., pp. 45-46. Admiral Cooney added: "We are not there to make money; we are there to serve. On the other hand, we are not there to lose money, because if we do, we cannot serve."

[91] Senate Subcommittee on Labor, *Amending the Fair Labor Standards Act of 1938*, p. 82.

[92] Ibid., p. 83. In the *MWSC Report*, vol. V, p. 512, Monroe Berkowitz stated: "Precise and measurable definitions of exploitation are difficult to establish. The ability of a worker who is dissatisfied with his pay and treatment to leave his employer is the best protection any individual, impaired or not, has against exploitation. Limited demand for impaired workers, as well as the inability of some client/employees to recognize and act on unfair practices, weakens the protection offered by the market.... the limited mobility of disabled workers create[s] a condition in which exploitation (in the sense of being paid less than nonhandicapped workers) can occur."

[93] In the 99th Congress, Rep. Marilyn Lloyd (D-TN) introduced H.R. 808. Based on the Burton bills of 1978 and 1980, it was not a focus of the 1985 hearings.

The Murphy Hearings (1985). In the mid-1980s, Congress again considered sheltered employment under Section 14(c) and, specifically, the treatment of workers with vision impairment. Immediately, the continuing gulf between employers of the disabled and spokespersons for the blind became apparent.[94] New legislation was proposed by Representative Thomas Petri (R-WI).

Hearings were convened on October 3, 1985, by Austin Murphy (D-PA), Chair of the Subcommittee on Labor Standards. In an opening statement, Representative Petri stated that the issue was not "labor standards" but rather service to the disabled. "It's not the intent" of this legislation, he said, "to lower or change what anyone is paid." Section 14(c), Mr. Petri observed, "has been called an administrative nightmare. It creates a tremendous paperwork burden, and there no longer appears to be much purpose to it...."[95] Therefore, Representative Petri called for **(a)** an end the distinction between WACs and regular workshops, and **(b)** elimination of any wage floor other than a *commensurate* productivity-based rate.

Industry spokesperson James Ansley (National Association of Rehabilitation Facilities) noted the "unnecessary burden on the employers" created by the minimum wage and separation features of Section 14(c) and, basically ignoring the data problems raised during earlier hearings and reports, endorsed the *commensurate* wage concept.[96] Other management witnesses concurred, arguing further that: the Section 14(c) program was too complex for effective administration: that DOL focused too heavily on paper violations, its regulations were confusing and the administrative burden was unconnected to rehabilitation. DOL site visits, they said, were infrequent, "tend to dwell on irrelevant details, and are all too often adversarial in nature."[97] Admiral Cooney of Goodwill Industries, though an active participant in prior hearings where the technical aspects of wage rate determination had been discussed, urged "doing away with the floor and then having the records be addressed to *the actual productivity* of the individual."[98]

Gashel of the NFB opposed the Petri bill. "We don't support the present form of Section 14(c) ..." he stated, branding it indefensible "in philosophy, theory or administration." He urged that the regular workshops continue to be separated from the WACs, but that the latter be redesigned "exclusively for therapeutic benefit for

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[94] At issue was employment of the disabled under DOL certification both in competitive industry and in the workshops, though it was the latter that was the focus of controversy.

[95] U.S. Congress, House Committee on Education and Labor, Subcommittee on Labor Standards, *Amendments to the Fair Labor Standards Act, Certification and Ages of Handicapped Workers*, hearing, 99th Cong., 1st sess., Oct. 3, 1985, p. 3. (Hereafter cited as House Subcommittee on Labor Standards, *Amendments to the Fair Labor Standards Act, Certification*.)

[96] Ibid., pp. 4-7. Under the minimum wage, there is a specific floor. With the "commensurate wage," the rate is determined by management with no floor and, in practice, with only limited DOL oversight.

[97] House Subcommittee on Labor Standards, *Amendments to the Fair Labor Standards Act, Certification*, p. 38.

[98] Ibid., p. 54. Italics added.

the clients." He suggested "a ban on subminimum wage payments in the case ... of blind and visually impaired workers" and that other groups of persons with disabilities be allowed to opt out of the Section 14(c) program as well.[99] However, where workers remained in sheltered employment, the paperwork requirements, he urged, were essential. Employers of the disabled, he reminded the Members, were seeking the right to pay their workers a sub-minimum wage with no floor. "The least we owe these people," he protested, "is some form of protection to be sure that they're not being exploited." The Petri bill, he charged, would "result in lower wages for handicapped workers."[100]

Section 14(c) Amended (1986). In March 1986, Senator Nickles introduced legislation parallel to the Petri proposal, noting that it would "end an inadvertent form of discrimination against" the most severely disabled and eliminate a minimum wage requirement that "has also been burdensome."[101] A period of gestation followed. In September 1986, new legislation was introduced: S. 2884 (for Senator Howard Metzenbaum (D-OH)) and H.R. 5614 by Mr. Murphy.[102]

S. 2884 expanded upon the Petri/Nickles legislation (i.e., eliminating the distinction between WACs and regular workshops, and replacing the minimum wage requirement with a *commensurate* wage) by adding a provision for an administrative system within DOL for contesting wage and related employment standards associated with the certificated disabled. As well, employers would be required regularly to review the special minimum wage rates paid to their employees and were precluded from reducing the wages of current employees (prior to June 1988) without DOL approval.[103]

Gashel offered his qualified endorsement for the Metzenbaum bill. For blind persons, he observed, "the appeal rights provided by an amendment would be a distinct improvement over current law." But this, he added, "does not alter our opposition to sub-minimum wages for all blind workers."[104]

The Senate quickly approved the legislation.[105] Five days later, on October 1, the Committee on Education and Labor was discharged from further responsibility for H.R. 5614: the bill was called up for immediate consideration. Mr. Murphy assured his colleagues that the bill would "greatly reduce the amount of bureaucratic red tape involved in certifying sheltered workshops" and "offer greater protection to the disabled employee." The legislation was necessary, he said, "because the present system for regulating sheltered workshops has not worked." He argued that the bill

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[99] Ibid., pp. 62-63.

[100] Ibid., pp. 62-64.

[101] *CR*, Mar. 6, 1986, pp. 3965-3966 (S. 2148).

[102] *CR*, Sept. 27, 1986, p. 26383, and Sept. 29, 1986, p. 27116.

[103] *CR*, Sept 26, 1986, pp. 26555-26556.

[104] Ibid., p. 26556. He made clear that the NFB, though approving the Metzenbaum amendment, did not regard the matter as settled.

[105] *CR*, Sept. 26, 1986, pp. 26557-26558.

would "hopefully insure against exploitation of this vulnerable sector of our work force."[106] Following brief discussion, H.R. 5416 was passed in the House. Thereafter, the House called up and passed S. 2884 (an identical bill) to clear it for dispatch to the President.[107]

On October 16, 1986, the Metzenbaum bill (S. 2884) was signed by President Reagan (P.L. 99-486). Section 14(c), as amended in 1986, *remains in place*.

Table 1. Specialized Wage Treatment of Workers with Disabilities Under the National Industrial Recovery Act (1933-1935) and the Fair Labor Standards Act (1938 ff.)

Statute	Certificated employment, competitive sector	Certificated employment, sheltered workshops	Certificated employment, work activities centers
National Industrial Recovery Act (1933-1935)	75% of minimum wage in the industry.[a]	No specified wage floor.[b]	NA
Fair Labor Standards Act (FLSA, 1938)	75% of the statutory minimum wage.[c]	No specified wage floor; the rate to be based upon productivity of the disabled worker.	NA
The 1966 FLSA Amendments	50% of the statutory minimum wage.	50% of the statutory minimum wage.	No statutory minimum wage; rate to be "related to the worker's productivity."
The 1986 FLSA Amendments (and forward)	No statutory minimum wage; a commensurate rate to apply.[d]	No separate standard, a commensurate rate to apply.	No separate standard, a commensurate rate to apply

a. Under the NIRA, there was no specified national minimum wage. Codes of practice were established for most industries which, normally, included minimum wage rates. By Executive Order, Feb. 17, 1934, a sub-minimum wage for the disabled was permitted that came to be set at 75% of the code minimum wage for the industry.

b. Sheltered employment was not covered by the NIRA codes; no alternative minimum wage rate was established.

c. No minimum wage for the disabled was specified in statute: discretion was left to the Secretary of Labor. Administratively, a minimum in competitive employment was set at not less than 75% of the statutory minimum wage under the FLSA.

d. There is no longer a statutory minimum wage for the disabled. The rate is to be "commensurate with those paid to nonhandicapped workers, employed in the vicinity ... for essentially the same

[106] *CR*, Oct. 1, 1986, p. 27495.

[107] Ibid., pp. 27495-27498.

type, quality, and quantity of work" and that is "related to the individual's productivity." No distinction is made between *work activities centers* and regular sheltered workshops; no distinction is made between certificated employment in the competitive sector and in sheltered workshops — though they are handled differently in administrative terms.

The Issue Reopened (1994)

Since the restructuring of Section 14(c) in 1986, it appears that the reform may not have worked out entirely as planned. By the mid-1990s, the parties, pro and con, had resumed the battle. New legislation was introduced early in 1994 and, almost immediately, the Subcommittee on Labor Standards conducted oversight hearings on the impact of the1986 amendments.

The Traficant Proposal

In March 1994, Representative James Traficant (D-OH) introduced H.R. 3966, the "Blind Workers' Wage Equity Act." Blind workers, he stated, "... have proven to be as productive as their sighted coworkers." Yet, "quality employees — are denied minimum wage, and they are denied it for one reason — the workshops are legally permitted to do it. Employers," he continued, "decide the prevailing wage for a job, then pay the blind worker a mere percentage of that wage." H.R. 3966 would have prohibited DOL from issuing a certificate under Section 14(c) to authorize payment of wages to anyone "by reason of such individual's impaired vision or blindness;" then, it defined blindness.[108]

Although the Traficant proposal would be discussed, at least tangentially during oversight hearings in the 103rd Congress (and would be adversely critiqued by employers of sheltered workers), it would not be acted upon.

The Murphy Hearings

In mid-March of 1994, Representative Murphy convened an oversight hearing on experience under the 1986 legislation. Mr. Murphy explained that in 1986, "we listened primarily to the nonprofit employers who ... were encumbered with a complicated system of permits and programs then required to administer a sheltered workshop." We "carefully considered the explanations of the workshop administrators" and "learned about white lines painted on the floor" to separate workers of differing levels of disability. "In return for employer flexibility, workers in sheltered environments received a right to an expedited hearing on any complaint of inadequate wages." However, he noted, the experience of DOL since then "has shown that few petitions by or on behalf of workers are filed." Whether that "is indicative of a lack of problems or of the difficulty of bringing such administrative action is something we hope to learn at today's hearing."[109]

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[108] *CR*, Mar. 11, 1994, p. 4795.

[109] U.S. Congress, House Subcommittee on Labor Standards, Occupational Health and Safety, Committee on Education and Labor, *Section 14(c) of the Fair Labor Standards Act*, (continued...)

Worker and Employer Testimony. Speaking for the NFB, James Gashel was blunt. In 1986, Congress had "insisted upon certain procedural safeguards. I am here to tell you that the safeguards are not working."[110] The problem, Gashel argued, was more than one of employer/manager culture: it was structural. Management is "empowered to gather all of the facts and make all of the decisions which end up justifying their determinations." The blind enter a workshop under the presumption of low productivity. Their employers, who control the work process, then monitor the worker's every move and create a work/productivity file — one that can be extremely negative. Then, when there is a dispute, the individual worker is left to contest not only the inappropriateness of the wage rate determination but, also, documentation the employer has systematically developed over an extended period. The workers, Gashel concluded, "can challenge the sub-minimum wage in a hearing, but they are almost certain to lose...."[111]

Employer spokespersons focused their counter arguments, in part, upon the Traficant bill. Admiral Cooney (Goodwill Industries), for example, termed H.R. 3966 "ill-advised" and stated that it "would reduce employment for thousands of workers with visual impairments." Terming charges of exploitation merely "unsubstantiated allegations," he noted that Section 14(c) "allow[s] workers with disabilities and/or their guardians to appeal wage determinations to the Secretary of Labor."[112] Patricia Beattie (National Industries for the Blind, *inter alia*), taking note of the appeals process under the 1986 amendments, thought the workers well protected.[113] But, she stated, there were other protections as well. "... we (NIB) visit each associated agency at least once every three years for a comprehensive on-site review of their compliance" with DOL regulations. Where they are not being complied with, "we strongly urge" that the agency/workshop take "appropriate action." Though "NIB does not have the legal authority similar to DOL to enforce the payment of back wages," she added, the associated agencies "are quite receptive."[114]

Testimony from Donald Elisburg (private citizen). Donald Elisburg who had been Assistant Secretary of Labor in the late 1970s was in 1994 an attorney in private practice.[115]

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[109] (...continued)
hearings, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington: GPO, 1994), pp. 1-2. (Hereafter cited as House Subcommittee on Labor Standards, *Section 14(c) of the Fair Labor Standards Act*.)

[110] Ibid., p. 11.

[111] Ibid., p. 11.

[112] Ibid., pp. 32-33.

[113] Ibid., pp. 26-27.

[114] Ibid., pp. 37-38.

[115] During his tenure as Assistant Secretary, he also served through "extensive periods" as acting Wage and Hour Administrator — and, in both capacities, had responsibility for administration of Section 14(c). He had testified as an Administration witness during the (continued...)

Elisburg commenced by stating that the "present system for challenging workshop abuses ... is a study in futility." He characterized the procedures included in the 1986 amendments as "not only not helpful, they are useless."[116] The problems under current law he regarded as systemic. As he proceeded with his testimony, he pointed specifically to the following issues: the absence of a class action option in pursuing an appeal and redress; the unrealistic constraints of time for dealing with Section 14(c) cases imposed upon public entities; the need for evidence that, likely, neither a disabled plaintiff nor his employer will have; a lack of clarity with respect to the responsibilities of the several parties (i.e., the Department of Labor, the courts, the employer, etc.); and that no provision was made for payment of attorney's fees — even when a plaintiff is successful in his or her litigation. The structure, he seemed to suggest, was stacked against the aggrieved person with a disability.

There was no option for a class action appeal. A petition to the Secretary seeking review of the special minimum wage "must be filed by the employee, the employee's parent, or guardian" — which, he argued, presents a serious problem. "Basically, the individual workers who are required to sign a complaint are put at tremendous risk of conflict with their employers under difficult employment circumstances."[117]

Time constraints were identified as another serious problem. In an attempt, it would seem, to assure prompt adjudication of complaints, Congress provided that the Secretary has ten days after receipt of a petition to assign the case to an administrative law judge who, then, must hear the case within thirty days. This process, Elisburg viewed as "an illusion." From his own experience with litigation in Texas, he observed, it had taken "15 months to bring [a comparable case] to closure."[118]

Evidentiary requirements and procedures were cited as troublesome; further, the court would necessarily become involved in the *commensurate rate* and *prevailing rate* determinations. The 1986 amendments mandated that "the employer shall have the burden of demonstrating that the special minimum wage rate is justified as necessary in order to prevent curtailment of opportunities for employment." But, in turn, the administrative law judge would be required to assess the validity of the evidence put forth by the employer. In addition, he must take into account the "productivity of the employee" and the "productivity of other employees performing work of essentially the same type and quality for other employers in the same vicinity."[119] From his own experience, Elisburg found:

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[115] (...continued)
Beard hearings of 1980. See discussion above.

[116] House Subcommittee on Labor Standards, *Section 14(c) of the Fair Labor Standards Act*, p. 20.

[117] Ibid., p. 20.

[118] Ibid., pp. 21-22. Representative Murphy termed the time constraints in the 1986 amendments as "the administrative equivalent of the speed of light." (p. 2)

[119] Section 14(c)(5)(C) and (D).

> ... that the sheltered workshop personnel and management had little understanding of the rules, the records they had were virtually nonexistent to support the exemption, and they had little economic justification for the wage scales they set.
>
> To make matters worse, it was also clear during the litigation of these cases that the administrative law judges did not fully understand or accept the notion that the employer had the burden of establishing the data to defend the exemptions claimed, and such confusion would impact on the judge's decision....

He raised concerns about the proper role to be filled by DOL in these cases (i.e., in providing technical support for the judge). The Department, Elisburg stated, "did not really have a well defined role as to how they were supposed to help in this case or, as a matter of fact, whom they were supposed to help."

But, if the system imposed a technical/evidentiary burden upon a judge, he suggested, it was even more onerous where the plaintiffs were concerned. Where workshop records are inadequate or non-existent, then a "worker's claim must be established by that worker's testimony of hours worked and wages paid on a piece work basis." Yet, the disabled worker has "almost no way of keeping separate counts of pieces produced or of hours worked." The responsibilities the system imposed upon the disabled worker (and his or her family) he viewed as overwhelming. "It is virtually impossible to proceed without the aid of an expert economist and experts in time and motion studies and related issues." Further: "To put that burden on the administrative law judge, who is not trained in wage and hour or any of the related kinds of issues, is also impossible."

Finally, Elisburg noted, there were the dollar costs of the entire proceeding with no provision having been made for attorney's fees.

> ... Congress has created a law that is not speedy, is extremely technical, permits below minimum wages to be paid to people whose only disability is that they are blind, insists that individuals pursue a claim on their own behalf, and then must pay legal fees even if the employer is at fault.

The persons filing these complaints, Elisburg reminded the Subcommittee, were fighting for the option of being paid at least the federal minimum wage. "How in good conscience can we ask these workers to also foot the legal bill?" He stated his doubt that the guarantees of Section 14(c) "can be enforced by any agency" and "to suggest that a worker earning $2.05 an hour can afford legal counsel is likewise ludicrous."[120]

Proposals of the 106th Congress

On January 27, 2000, Representative Johnny Isakson (R-GA) introduced H.R. 3540, a bill to amend the FLSA to provide that the "Secretary shall not issue a certificate" for the payment of sub-minimum wages under Section 14(c) "to any

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[120] House Subcommittee on Labor Standards, *Section 14(c) of the Fair Labor Standards Act*, pp. 21-25.

individual by reason of such individual's impaired vision or blindness." The bill then defines impaired vision or blindness.[121] On February 3, 2000, a companion bill (S. 2031) was introduced by Senator Christopher Dodd (D-CN).[122] The Isakson bill was referred to the Committee on Education and the Workforce and, later, to the Subcommittee on Workforce Protections.

The bills were essentially the same as the Traficant proposal of the 103rd Congress. Like the Traficant bill, they would not have precluded the possibility that a certificate could be issued for employment at a sub-minimum wage to multiply-disabled individuals who happen, as well, to be blind or vision-impaired. (As noted earlier in the paper, precise data with respect to such workers are difficult to develop.) The Dodd bill was referred to the Committee on Health, Education, Labor, and Pensions. Each remained in committee at the close of the 106th Congress.

Activity During the 107th Congress

An issue of continuing interest, although perhaps for a relatively small segment of the workforce, management of the Section 14(c) program and treatment of workers with disabilities re-emerged in the 107th Congress.

New Legislation

On March 6, 2001, Representative Isakson introduced H.R. 881 which was referred to the Committee on Education and the Workforce, Subcommittee on Workforce Protections. Like its counterpart in the 106th Congress, H.R. 881 would have prevented the Secretary of Labor from issuing a certification for the payment of a sub-minimum wage to persons who are vision-impaired — solely on the basis of vision impairment. The bill would not, however, have prevented the issuance of such a certificate where potential workers have multiple disabilities, one of which may be vision impairment. No action was taken on the Isakson proposal.

GAO Revisits Section 14(c)

In September 2001, the General Accounting Office released a new study, *Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers With Disabilities, But Labor Should Improve Oversight*.[123] The agency focused upon (a) "the characteristics of employers that employ individuals with disabilities at less than the minimum wage" under the Section 14(c) program, (b) "the characteristics of workers with disabilities who earn less than the minimum wage," and (c) the DOL's "management of the special minimum wage program."

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[121] *CR*, Jan. 27, 2000, p. H49.

[122] *CR*, Feb. 3, 2000, p. S328.

[123] United States General Accounting Office, Report to Congressional Requesters, *Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers With Disabilities, But Labor Should Improve Oversight*, GAO-01-886, Sept. 2001, 73 p.

Of what it estimated to be more than 5,600 employers of workers with disabilities, GAO found, "about 84 percent are work centers established to provide employment opportunities and support services to individuals with disabilities." It also found that "74 percent of the workers paid special minimum wages by work centers have mental retardation or another developmental disability as their primary impairment, and 46 percent have multiple disabilities." GAO reported that DOL "has not effectively managed the special minimum wage program to ensure that 14(c) workers receive the correct wages." It noted that "in past years," the Department had "placed a low priority on the program." DOL, it asserted, "lacks the data it needs to manage the program and determine what resources are needed to ensure compliance by employers." GAO concluded that the Department "has not done all it can to ensure that employers comply with the law" and "has provided little training to its staff" that would enable them to work with the several program participants.[124]

During Subsequent Congresses

As discussed above, treatment of persons with disabilities, for labor standards purposes, has been a continuing issue. However, it did not resurface during the 108th Congress where the primary issue was concern with overtime pay.[125] If Congress perceives that revision of Section 14(c) is appropriate, new proposals *could* emerge at any time — either as free standing legislation or as part of a more general umbrella measure dealing broadly with minimum wages, overtime pay, and related matters. Of course, there is no statutory requirement that Congress revisit this issue.

Concluding Observations

Largely, Section 14(c) issues involve wages. How much must employers pay disabled workers in sheltered employment? Even concern about separation of the workshops from the WACs (notwithstanding discussion of *role models*) has been largely wage-based. The wages, in question, have always been minimal. When, in 1986, Congress moved from a statutory minimum rate (not less than 50% of the FLSA minimum) to a *commensurate* wage standard, the highest statutory rate required would have been approximately $1.68 per hour. Since 1986, the rate for disabled workers has been productivity-based ("commensurate"). As noted above, the wage rests upon a foundation of individual worker productivity, however measured. Such rates, because they are productivity-based, may fluctuate from one production process to the next — from one day to the next. In practice, it would

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[124] GAO Report GAO-0l-886, pp. 3-5. This is a complex document that needs to be read with care.

[125] On Mar. 31, 2003, the Department of Labor proposed a revision of Section 13(a)(1) of the Fair Labor Standards Act, dealing with executive, administrative and professional workers. The issue remained active through late August 2004 when formally implemented.

appear, wage rates are set, essentially, at whatever the employer determines the economic value of the worker to be and can document.[126]

Much of the administrative structure supportive of Section 14(c), similarly, has been created with the wage issue in mind. It involves complicated measurement of disability, of productivity, of comparability with production in competitive industry — and, for enforcement purposes, oversight by the Department of Labor. Finally, in theory, there are options for appeal of wage determinations. Some, however, have questioned the value of these processes. Do they result in accurate findings? Are they unduly cumbersome?[127]

Since the mid-1960s at least, concern has been voiced, pro and con, about separation of the WACs from the regular workshops. This is often argued in terms of *role models* (a chance for the severely disabled to work alongside less disabled workers) — and in terms of the *dignity* and *self-esteem* of the severely disabled. On the other hand, the needs of the less severely disabled may not be served as well by ignoring differences in ability levels. And, mixing workers of significantly different levels of ability may produce tensions within each group. Where the severely disabled may find themselves striving to meet challenges that are beyond their capabilities, the less severely disabled may find themselves subjected to a collectively calculated sub-minimum wage. Though workshop managers may find it economically useful to deal with the disabled as a homogenous group, it may be reasonable to distinguish between levels of disability (as the Congress judged it to be in 1966) and to structure work and rehabilitation (not necessarily the same things) to meet specific needs of the disabled clients and/or employees.

The Section 14(c) sub-minimum wage option is rooted in the premise that, in order "to prevent curtailment of opportunities for employment," a wage rate "lower than" the otherwise applicable FLSA minimum may be justified. There appears to be little hard evidence whether or not a reduced wage rate prevents curtailment of

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[126] As noted elsewhere in the report, methodologies for calculation of relative productivity vary substantially among places of employment, partly reflecting the sophistication of the employer. As well, disabled workers are often engaged in group work in which their individual productivity may well be beyond their own individual ability to control. Although there is testimony, largely anecdotal, that the workers engaged in sheltered employment through recent years are more severely disabled than those of earlier periods, such comparisons are difficult to document.

[127] The degree of worker satisfaction with sheltered employment probably can't be shown with any reasonable accuracy. Individual sheltered workers may be unhappy in their work and dissatisfied in the program of which they are a part; but, on the other hand, their parent or guardian may have praise for the arrangement. Assessment must take into account degrees of articulateness where the disabled are concerned. Even complaints, *per se*, may be difficult to assess — for all of the reasons suggested by Donald Elisburg during the 1994 hearings, discussed above. Should a complaint to a supervisor be credited and given weight comparable to that lodged with DOL. Where a complaint, even if raised with DOL, is not pursued (perhaps because of the cost of difficulty of doing so), should it be discounted. As Representative Murphy noted at the commencement of the 1994 hearings, it is not clear whether the paucity of official complaints "is indicative of a lack of problems or of the difficulty of bringing such administrative action."

opportunities for employment. Unfortunately, the data are sparse and provocative of further questions. Would all types of disability be equally impacted by a reduced wage option? And, in which types of employment? That employers in competitive industry actually hire persons with disabilities at the sub-minimum rate whom they would not have hired had they been required to pay a full *minimum* wage is difficult to document.

The option of paying lower wages, some argue, encourages employers more readily to hire the disabled and to spend the time to deal with their presumed idiosyncracies. Whatever their productive level, it is argued, the sub-minimum wage opens the door to employment: thus — an *opportunity* wage.[128] Others view the issue differently. They point out that in theory, the disability must be linked directly to diminished productivity; in practice, that linkage may not be obvious. Some argue that the sub-minimum wage option inflicts an additional burden: the disabled worker (in the context of Section 14(c)) must *prove* that he is sufficiently productive to merit at least the minimum wage; a worker without a recognized disability is *presumed* to be worth at least the FLSA minimum.

It has been argued that, on several levels, a dichotomy has been built into the Section 14(c) program. From the hearings, it has not always been clear, for example, how *clients* were distinguished from *workers* — or, for that matter, that they always have been. Some may view the progression from the client, to the worker in the workshop, and to the worker in competitive industry as a continuum. It appears that, in practice, differentiation is not always made. The issue becomes more complex in light of other internal program conflicts. While the workshops are normally nonprofit institutions, they compete in the world of commerce — for contracts through which to sustain their nonprofit activities. Thus, while they seek to *transition* their clients into competitive industry, they may at the same time be reluctant to lose their best workers. In terms of public policy, while the workshop/WAC community may be the beneficiaries of public subsidies (tax concessions, special marketing arrangements, charitable contributions, etc.), they may also compete with private sector firms and their employees. In practice, do the managers of workshops and WACs regard themselves as corporate CEOs, as social services workers, or both — and, do these several identities sometimes clash?

Making commensurate wage rate determinations is a technically challenging task. It is not clear, from a review of the various hearings and reports, that workshop operators/managers have the expertise effectively to implement such a wage structure. Nor is it clear that the DOL, were it to place a priority upon compliance with the spirit motivating Section 14(c), has the means necessary to effect compliance.

It seems reasonable to assume that Section 14(c) will continue to be a focus of debate. As discussed above, a variety of policy options might be considered by Congress in dealing with this matter. In addition to legislative proposals suggested through the years, other options might include: developing additional financial

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[128] These arguments have also been used with respect to other segments of the workforce, notably, youth workers.

subsides for those in sheltered employment; an attempt to establish a clearer distinction between rehabilitation, on the one hand, and work on the other — with different patterns of activity for workers and for *clients* or *patients* engaged under Section 14(c); reconsideration of the concept of minimum compensation (and *commensurate* rates) in the Section 14(c) context; or elimination of the Section 14(c) exemption entirely. Conversely, Congress may find, upon review, that the present system is functioning as well as any might, and that no remedial action is warranted